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No. 93-390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE YOUGHIOGHENY AND OHIO COAL COMPANY,
Petitioner,

v.

WAYNE N. MCANGUES,

and

DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,

and

THE BENEFITS REVIEW BOARD,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF OF PETITIONER

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December 22, 1993

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POINTS IN REPLY

The Federal Respondents attempt to circumvent the true impact of the lower Court's holding. It is clear that this case presents legal questions of national importance.

The Solicitor General's Brief states in *ex cathedra* fashion that the Court of Appeals was correct and further review is "unwarranted". His argument basically is that there are not important federal questions to be resolved. However, the very arguments attempted in his Brief dem-

onstrate that important federal questions are presented by this case. The Solicitor's Brief, protestations to the contrary notwithstanding, actually recognizes the important questions presented herein, and hence the need for plenary review.

The Solicitor's Response (at pg. 9) recites:

> "As the court of appeals noted (Pet. App. 8a), petitioner does not dispute that McAngues' lung *disability* relates solely to coal-mining [sic]." (Emphasis added).

This statement by the Court of Appeals and the Solicitor is inaccurate and confuses an admission of the existence of radiographic pneumoconiosis with the clearly contested factual issue of whether lung disability exists. There is no question that in this claim there is *presumed* total disability pursuant to 727.203(a)(1) due to the admitted factual radiographic evidence of pneumoconiosis. However, that presumption does not end the adjudication. There is no question in this claim that there is factual total disability arising from the medical residuals of an automobile accident. The clearly contested issue in this claim pursuant to 727.203(b)(3) rebuttal is what factual disability, if any, arises from coal mine employment.[1]

This contested factual issue is obscured by the Byzantine logic common to black lung litigation. This confusion

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[1] Oddly, in this claim the (b)(3) rebuttal finding and the award rest on Dr. Tipton's report which discusses both the residuals of the automobile accident and Mr. McAngues' lung conditions, then merely concludes "Based on the studies and the history and the examination, it is my opinion that Mr. McAngues is disabled regarding gainful coal mine employment." (Pet. App. 60a) Dr. Tipton never addresses whether he diagnosed disability due solely to the automobile accident, due solely to the lung condition, and/or due to some combination of the two.

On the other hand, Dr. Kress finds the existence of radiographic pneumoconiosis (Pet. App. 81a), but clearly states that such pneumoconiosis is not resulting in any significant pulmonary or respiratory impairment. (Pet. App. 55a) Hence, Dr. Kress found no disability arising in whole or in part from coal mine employment. (Pet. App. 81a)

arises in large part because of the different interpretations of the Black Lung Act's statutory language awarding benefits when a coal miner is "totally disabled due to pneumoconiosis" (30 U.S.C. § 901).

This confusion transcends the 20 C.F.R. 727 regulations and also includes the 20 C.F.R. 718 regulations as is apparent from the Benefits Review Board and Circuit Court decisions cited in Petitioner's original Petition for Writ of Certiorari. A definitive interpretation of the Black Lung Act's term "total disability due to pneumoconiosis" is most necessary to clarify the ongoing administration of the Federal Black Lung Act regardless whether the claims are under the 20 C.F.R. 727 or 20 C.F.R. 718 regulations.

CONCLUSION

The Court should grant certiorari to resolve the question raised about the standard to be applied in determining "total disability due to pneumoconiosis" as required by the Federal Black Lung Act when a coal miner has pneumoconiosis, and when the coal miner is totally disabled from other non-occupational causes.

This Court of Appeals decision runs counter to the 4th and 7th Circuits and this Court's *Usery* opinion. It departs from the accepted and usual course of judicial proceedings. It sets an improper standard for other cases to be adjudicated under. Thus, it is important that the writ issue.

Respectfully submitted,

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